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Report of the International Law Commission on the work of its sixty-eighth session (2016)

Topical summary of the discussion held in the Sixth Committee of the General Assembly during its seventy-first session, prepared by the Secretariat

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I. Introduction

1. At its seventy-first session, the General Assembly, on the recommendation of the General Committee, decided at its 2nd plenary meeting, on 16 September 2016, to include in its agenda the item entitled "Report of the International Law Commission on the work of its sixty-eighth session" and to allocate it to the Sixth Committee.

2. The Sixth Committee considered the item at its 20th to 30th and 33rd meetings, from 24 to 28 October and from 1 to 3 and 11 November 2016. The Committee considered the item in three parts. The Chairperson of the Commission at its sixty-eighth session introduced the report of the Commission on the work of that session (A/71/10) as follows: chapters I to VI and XIII at the 20th meeting, on 24 October; chapters VII to IX at the 24th meeting, on 27 October; and chapters X to XII at the 27th meeting, on 1 November.

3. At its 33rd meeting, on 11 November 2016, the Sixth Committee adopted draft resolution A/C.6/71/L.26, entitled "Report of the International Law Commission on the work of its sixty-eighth session" and draft resolution A/C.6/71/L.31, entitled "Protection of persons in the event of disasters". After the General Assembly had considered the relevant report of the Sixth Committee (A/71/509), it adopted the draft resolutions at its 62nd plenary meeting, on 13 December 2016, as resolutions 71/140 and 71/141, respectively.

4. The present topical summary has been prepared pursuant to paragraph 34 of resolution 71/140, by which the General Assembly requested the Secretary-General to prepare and distribute a topical summary of the debate held on the report of the Commission at the seventy-first session of the Assembly.

5. The present topical summary consists of two parts. The first part contains seven sections, reflecting the current programme of work of the Commission: A. Crimes against humanity (A/71/10, chap. VII); B. Protection of the atmosphere (ibid., chap. VIII); C. *Jus cogens* (ibid., chap. IX); D. Protection of the environment in relation to armed conflicts (ibid., chap. X); E. Immunity of State officials from foreign criminal jurisdiction (ibid., chap. XI); F. Provisional application of treaties (ibid., chap. XII); and G. Other decisions and conclusions of the Commission (ibid., chap. XIII). The second part contains topics on which the Commission completed work at its sixty-eighth session. The Commission completed the first reading of the topics: A. Identification of customary international law (A/71/10, chap. V); and B. Subsequent agreements and subsequent practice in relation to the interpretation of treaties (ibid., chap. VI); it will resume consideration of both topics at its seventieth session in 2018. The Commission also completed, on second reading, the topic "Protection of persons in the event of disasters" (ibid., chap. IV).

II. Topics on the current programme of work of the Commission

A. Crimes against humanity

1. General comments

6. Delegations generally welcomed the adoption of draft articles 5 to 10 at the sixty-eighth session of the Commission, which were considered by some delegations to be balanced and appropriate. Several delegations emphasized that the draft articles should complement and be compatible with existing instruments and regimes relevant to the topic, in particular the Rome Statute of the International Criminal Court. The importance of the topic, and in particular of the prevention and punishment of crimes against humanity, was acknowledged.

7. A number of delegations welcomed the focus of draft articles 5 to 10 on measures to be taken by States at the national level.

2. Specific comments

8. Support was expressed by some delegations for the adoption of draft article 5 (criminalization under national law). It was suggested by other delegations that conspiracy, incitement and attempt to commit an offence should be included in the draft articles. Support was also expressed by some delegations for paragraph 3 of draft article 5, which sets out command and superior responsibility for crimes against humanity, while others considered that parts of paragraph 3 would benefit from more precision and clarification, in particular with respect to the standards of command responsibility. Paragraph 4 was welcomed by some delegations, although a view was expressed that paragraph 4 should envisage the possibility of mitigating circumstances in case of commission of an offence by a subordinate following orders. A number of delegations supported paragraph 5 and the inapplicability of a statute of limitations for crimes against humanity. With respect to paragraph 6 and the penalties that States may impose, several delegations suggested that the draft articles should expressly exclude the death penalty as a punishment for crimes against humanity. While support was expressed for the inclusion of criminal liability of legal persons in paragraph 7, several delegations emphasized that the subject required further consideration by the Commission, and the view was expressed that the provision of criminal liability of legal persons should be deleted from the draft articles.

9. With respect to draft article 6 (establishment of national jurisdiction), support was expressed by some delegations for its inclusion. On the use of the expression "jurisdiction" in paragraph 1, a proposal was made that it might be more appropriate to use the expression "jurisdiction or control" rather than "jurisdiction". A number of delegations indicated that it would be fitting to establish universal jurisdiction under paragraph 3, given the nature of crimes against humanity. However, a concern was raised that the formulation of paragraph 3 was vague and could be taken to allow for the establishment of universal jurisdiction.

10. While support was expressed for draft article 7 (investigation), a number of delegations indicated that the parameters of investigation, as well as the extent of

the obligation of States to investigate acts constituting crimes against humanity, needed to be specified and clarified. Concerning the interpretation of the expression "in any territory under in its jurisdiction" in draft article 7, it was suggested that such an expression covered both *de jure* and *de facto* jurisdiction.

11. Some delegations supported the wording and content of draft article 8 (preliminary measures when an alleged offender is present). However, a concern was raised in relation to paragraph 3 and the impact that the obligation of a State to report the findings of the preliminary inquiry to another State could have on the outcome of the preliminary inquiry.

12. With respect to draft article 9 (*aut dedere aut judicare*), some delegations supported its inclusion, while others emphasized that it would be more appropriate to align its wording with that of article 7 of the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft (the "Hague Formula"). The view was expressed that the reference to "competent international ... tribunal" in draft article 9 was not suitable, as the purpose of the draft articles was to facilitate inter-State cooperation rather than cooperation with international tribunals.

13. Several delegations supported the inclusion of draft article 10 (fair treatment of the alleged offender), while a question was raised as to whether the draft article was necessary. It was suggested that the reference to "human rights law" in paragraph 1 did not seem to be necessary, as human rights law was already subsumed by the reference to "applicable national and international law" in that same paragraph. Further explanation on the inclusion of stateless persons in paragraph 2 (a) was requested, as the provision seemed to depart from existing human rights treaties.

3. Future work

14. Some delegations suggested certain issues to be addressed by the Commission in its future work on the topic, such as extradition, cooperation and assistance, universal jurisdiction, the responsibility of States or non-State actors, and indirect perpetration. It was suggested that the Commission should avoid addressing the issue of civil jurisdiction and immunity.

4. Final form

15. Support was expressed by several delegations for the Commission's work in developing a convention on the prevention and punishment of crimes against humanity in order to end impunity, facilitate cooperation and assistance, and fill the existing gap in international law. While a question was raised as to whether the object of the work on the topic should be a convention, the view was expressed that a convention might not be desirable at this time and that guidelines might be more appropriate for the topic instead, given the existing multilateral treaties, including the Rome Statute, that already addressed crimes against humanity. Some delegations suggested that a monitoring mechanism for a future convention might not be desirable and that caution was needed on the subject. Attention was also drawn to the international initiative to conclude a multilateral treaty for mutual legal assistance and extradition for domestic prosecution of the most serious international crimes and to the need for close cooperation between the Commission and the sponsors of that initiative.

B. Protection of the atmosphere

1. General comments

16. Several delegations supported the Commission's work on the topic to date and welcomed the development of draft guidelines, which constituted proposals for a general framework for the protection of the atmosphere from pollution and degradation. Some delegations emphasized that the Commission's work should not interfere with or duplicate relevant political negotiations. A number of delegations also reiterated their doubts regarding the usefulness of the Commission's work on the topic in the light of existing international agreements.

17. While some delegations noted that the draft guidelines went beyond the confines of the 2013 understanding on how the Commission would address the topic, others observed that the draft guidelines followed the understanding. It was also pointed out that the limitations stipulated in the 2013 understanding would negatively affect the Commission's work. A number of delegations laid out their domestic legislation relevant to the topic. The dialogue between the Commission and scientists was commended.

18. In relation to the approach taken by the Commission, several delegations raised doubts as to whether the protection of the atmosphere, which operated on a global scale, could be legally addressed in the same way as transboundary aquifers, watercourses or transboundary harm. Others nevertheless noted that the previous work of the Commission on those issues might be useful.

19. While some delegations welcomed the overall structure of the draft guidelines, particularly the link between draft guideline 3 and the ensuing obligations in draft guidelines 4 to 6, some other delegations stated that drafting guidelines on those aspects was premature as the scope of the guidelines lacked clarity. Moreover, concern was expressed regarding the inclusion of "obligations" in the draft guidelines. However, it was also noted that draft guidelines 2 to 4 were based on existing legal rules and principles.

2. Specific comments

20. The inclusion, in 2015, of preambular text specifically recognizing the limits of the Commission's work was welcomed. It was also stated that it would be inappropriate to mention this limitation in the text of the draft guidelines. Several delegations supported the inclusion in 2016 of the reference to the special needs and situation of developing countries into the draft guidelines. Some delegations requested that the principle of common but differentiated responsibilities be included in the draft guidelines. On the other hand, doubts were also expressed as to the need for such specific preambular text, especially as the principle of common but differentiated responsibilities was explicitly excluded from the scope of the draft articles by the 2013 understanding. Several delegations also stated that the preambular reference did not adequately reflect the special circumstances and real needs of developing countries, especially in the light of the 2015 Paris Agreement on climate change. Preference was expressed for the expression initially proposed by the Special Rapporteur, "Emphasizing the need to take into account the special situations of developing countries".

21. In relation to draft guideline 1 (use of terms), provisionally adopted by the Commission in 2015, the feasibility of distinguishing between "atmospheric pollution" and "atmospheric degradation" was questioned. It was also suggested that the phrase "ambient air quality" be inserted into the definition of "atmospheric degradation". As regarded draft guideline 2 (scope of the guidelines), also provisionally adopted by the Commission in 2015, some delegations sought clarification as to the types of activities that caused pollution, including precursors of pollution, and activities that destroyed the atmosphere. It was noted that the scope of the draft guidelines should be restricted to anthropogenic activities that might affect the protection of the atmosphere.

22. Several delegations welcomed the inclusion of the due diligence obligation of States to protect the atmosphere in draft guideline 3 (obligation to protect the atmosphere), noting that draft guideline 3 was a cornerstone of the text of the draft guidelines as a whole. It was also pointed out that the reference to "States" in the draft guideline denoted both the possibility of States acting "individually" and "jointly", as appropriate, which buttressed the obligation to cooperate in draft guideline 8. Some delegations underlined the *erga omnes* nature of the obligation to protect the atmosphere. Other delegations noted that the due diligence obligation required further clarification, inter alia, with regard to appropriate measures to be taken and the phrase "in accordance with the capabilities of the State" used in the commentary. It was also suggested that the draft guideline be reformulated with wording similar to that used in draft guideline 4 and the formulation "reduce or control" be replaced by "reduce and control", and the reference to "technology" in the corresponding commentary be "science and technology".

23. Several delegations emphasized the significance of including environmental impact assessments in draft guideline 4 (environmental impact assessment). Several delegations proposed that States should be required to update their atmospheric protection policies regularly, taking into consideration the possible synergies between air quality and climate policy. Some delegations asked for further explanations as to the threshold for a "significant adverse impact". It was noted that, while many activities might individually not have a significant adverse effect, their cumulative impact could be significant. The view was expressed that it was important to emphasize the need for authorization of environmental impact assessments by public authorities. While it was pointed out that the phrase "proposed activities" was overly broad, it was also questioned why the Commission had not included a broader reference to relevant procedures, as done in its articles on prevention of transboundary harm from hazardous activities. Some delegations observed that references to procedural aspects, such as transparency and public participation, in the draft guideline were possibly not necessary, as this would give greater flexibility and latitude to States. Other delegations stated that they did not understand the rationale behind omitting such references.

24. Several delegations supported draft guideline 5 (sustainable utilization of the atmosphere), noting that the overarching principle contained therein was essential for the interpretation of the first four draft guidelines. A number of delegations highlighted the link between the protection of the atmosphere and sustainable economic development. However, the Commission was asked to provide a better definition of the term "utilization" in the commentary. The suggestion was also made to move the reference to the atmosphere as a limited resource to the preamble.

Moreover, the Special Rapporteur was requested to conduct an in-depth study on, inter alia, the issue of reconciling economic development with the protection of the atmosphere.

25. Several delegations welcomed the inclusion of draft guideline 6 (equitable and reasonable utilization of the atmosphere) and noted that the Commission should elaborate on the legal implications and application of the principle. While emphasizing the respect for intergenerational equity, some delegations inquired how and by whom would the interests of future generations be identified. The Special Rapporteur was also asked to examine the factors to be assessed in the balancing of interest in the present and future generations.

26. In relation to draft guideline 7 (intentional large-scale modification of the atmosphere), a number of delegations noted that geoengineering was a very important topic but needed to be approached with prudence and could benefit from the input of scientific experts. Some delegations stated that the Commission should consider excluding geoengineering from the draft guidelines, as the scope of the draft guideline was unclear and practice was evolving. Other delegations proposed reformulating the draft guideline in clearer and stronger terms and defining the term "intentional large-scale modification of the atmosphere". The Commission was asked to clarify how draft guideline 7, which was formulated in very soft terms, was related to draft guideline 3. It was also suggested that the draft guideline should expressly state that military activities were excluded from its scope.

27. Concerning draft guideline 8 (international cooperation), provisionally adopted by the Commission in 2015, some delegations reiterated their criticism of the limited scope of the provision. It was also noted that references to joint action in the draft guidelines could be more assertive. The references to scientific collaboration, exchange of information and joint monitoring in the draft guideline were nevertheless welcomed.

3. Future work

28. While several delegations supported the Special Rapporteur's intention to investigate the relationship between the protection of the atmosphere and other areas of international law, it was pointed out that this would move the Commission further from its mandate to progressively develop and codify international law. It was also noted that it would be useful if the Commission addressed the effect of the use of all types of weapons on the environment, and in particular of the development, stockpiling and use of nuclear weapons. A number of delegations asked for the Commission to further study the concepts of "common heritage of mankind" or "common concern of humankind", particularly with regard to the language used in the 2015 Paris Agreement. However, it was also pointed out that the Commission had rightly dropped the draft guideline on this aspect. While some delegations hoped that the Commission would address the question of State responsibility for atmospheric pollution and degradation, the Special Rapporteur's intention to deal with issues of implementation, compliance and dispute settlement was criticized as being possibly inconsistent with the 2013 understanding. Concerns were expressed regarding the Special Rapporteur's long-term programme of work and the Commission was requested to suspend or discontinue its work on the topic.

The Special Rapporteur was also requested to clarify how his future work would relate to the 2013 understanding.

C. *Jus cogens*

1. General comments

29. Several delegations welcomed the first report of the Special Rapporteur on *jus cogens* (A/CN.4/693) and the Commission's work on the topic. While some delegations attached importance to furthering the work undertaken, others expressed reservations about the consideration of the topic by the Commission.

2. Specific comments

30. With regard to the scope of the topic, a number of delegations urged the Commission not to deviate from the definition of *jus cogens* as provided for in article 53 of the 1969 Vienna Convention on the Law of Treaties. More specifically, the view was expressed that the elements of *jus cogens* proposed by the Special Rapporteur were at variance with the basic elements of *jus cogens* as defined in article 53 of the Vienna Convention and were, in essence, an alteration of the meaning of *jus cogens*. Moreover, the point was made that, against a backdrop of international law that is developing through consent-based instruments, it would be injudicious to expand upon a principle that certain universal norms can bind States irrespective of State consent.

31. Some delegations noted that the effects of *jus cogens* were not limited to the law of treaties, but related to topics such as State responsibility and immunity. However, it was also stated that the direction that the Special Rapporteur was intending to take, of including the issue of State responsibility, was questionable. More precisely, it was argued that including issues of State responsibility in the Commission's work on *jus cogens* could undermine the balance achieved in the 2001 articles on the responsibility of States for internationally wrongful acts. It was considered that this would be regrettable, since international courts and tribunals frequently referred to them, and because the possibility of negotiating a convention on the basis of the 2001 articles was again under consideration.

32. Concerning the methodology, delegations generally recommended that the Commission focus on the identification and legal consequences of a norm having *jus cogens* status. The view was nonetheless expressed that the Commission should at present focus on the legal consequences and consider deferring the identification process. Delegations also suggested that the Commission should focus on State and judicial practice, supplemented by scholarly writings. It was stated that the Commission should also take into account the views of international and non-governmental organizations. It was further proposed that the Commission undertake an in-depth study of the *travaux préparatoires* of the Vienna Convention on the Law of Treaties. Preference was also expressed for a more conceptual approach.

33. Some delegations advised against preparing an illustrative list of *jus cogens* norms. It was stated that a list would soon become obsolete and, although it may be seen as instructive, serving as guidance, it would not aid lawyers in providing tools

to determine for themselves whether norms had achieved the status of *jus cogens* or not.

34. Whereas some delegations suggested that a possible list could be considered at a later stage, other delegations expressed their support for the development of a non-exhaustive list. For example, it was argued that, without some kind of a list, the draft conclusions would be less effective. It was also underlined that a list should reflect a hierarchy between *jus cogens* norms themselves, with the prohibition on the use of force at the top of the list, and that the list should only include the most widely accepted norms.

35. With regard to draft conclusion 2 (modification, derogation and abrogation of rules of international law) proposed by the Special Rapporteur, some delegations raised doubts about the reference to *jus dispositivum*. More specifically, the point was made that a definition of *jus dispositivum* had no place within a set of conclusions devoted to *jus cogens*. It was also emphasized that there was no need to establish rules on the modification of or derogation from rules of international law separate from *jus cogens* norms; not only was that not the purpose of the work on the topic, but also it could affect specific existing rules. For example, the Vienna Convention on the Law of Treaties contained specific rules on the amendment, modification and termination of treaties. Furthermore, it was noted that the possibility of derogation under other sources of international law had its own particularities that did not need to be addressed in the work on *jus cogens*. Additionally, it was mentioned that, if the Commission decided to pursue a comparison between *jus cogens* and *jus dispositivum*, it would need to be very clear about the justification for such an analysis, and how the two concepts differed.

36. The recommendation was made that draft conclusion 2 (2) be merged with draft conclusion 3 (1), and it was underlined that the expression "other agreement" in the second sentence of paragraph 1 of the draft conclusion was ambiguous and needed further clarification. It was also opined that the words "agreement of" before "States" in the first sentence of that paragraph should be removed because, as indicated in the second sentence of the same paragraph, such changes could take place not only through various forms of agreements but also through customary international law. According to another view, doubt was expressed as to the distinction between "abrogation" and "derogation" in international law, and caution was expressed against proceeding with draft conclusion 2, as it was difficult to imagine or illustrate how non-derogable peremptory norms could be modified, derogated from or abrogated.

37. While the importance of investigating the possible existence of regional *jus cogens* was emphasized, some delegations found the concept difficult to reconcile with the universal and unconditional character normally ascribed to *jus cogens*. It was noted that any study should clearly distinguish between regional *jus cogens* and universal *jus cogens*. Some delegations were circumspect about the concept of regional *jus cogens*, since its existence could raise concerns as to what would happen in instances where it conflicted with universal *jus cogens*. It was further underlined that to accept the existence of a regional *jus cogens* would be to fail to recognize the criterion in article 53 of the Vienna Convention on the Law of Treaties, namely the recognition of such a norm by the international community of States as a whole.

38. Some delegations considered the notion of the persistent objector to be incompatible with the concept of *jus cogens*. More particularly, it was noted that the concept could undermine the well-established universal applicability of *jus cogens* norms. Similarly, it was mentioned that allowing the notion of the persistent objector to extend from customary international law norms to *jus cogens* norms would be contrary to the inherent character of *jus cogens* norms, from which no modification, derogation or abrogation was permitted, with a view to ensuring universal adherence to rules of such an exceptional nature.

39. Commenting on draft conclusion 3 (2) (general nature of *jus cogens* norms), some delegations agreed that *jus cogens* norms enjoyed superiority, universality and reflected fundamental values. Yet, it was considered that the meaning and purpose of the paragraph were unclear and that describing *jus cogens* norms as protecting "fundamental values" and as being "universally applicable" would open the door to attempts to derive *jus cogens* norms from vague and contestable natural law principles, without regard to their actual acceptance and recognition by States. Similarly, the necessity of referring to "the values of the international community" was questioned. Another view that was voiced indicated doubt about the necessity of a reference in paragraph 2 to the hierarchical superiority of norms of *jus cogens*. Moreover, the question as to whether *jus cogens* norms could prevail over the Charter of the United Nations was raised.

40. In contrast, disappointment was expressed that the Commission was not able to agree on what were considered basic and uncontroversial characteristics, namely *jus cogens* norms were universally binding, reflected fundamental values and interests and were hierarchically superior.

3. Future work

41. Some delegations suggested that the Commission address the relationship between *erga omnes* obligations and *jus cogens*, including within the context of treaty-based *jus cogens*, between customary international law and *jus cogens*, between *jus cogens* and the Charter of the United Nations and between *jus cogens* and other norms in general, including principles of international law, as well as the application of the persistent objector rule to the topic. Furthermore, some delegations agreed that the Special Rapporteur should consider the relationship between *jus cogens* and non-derogation clauses in human rights treaties.

4. Final form

42. As to the outcome of the consideration of the topic, a number of delegations agreed with the development of draft conclusions, while it was underlined that drawing conclusions would be a difficult and complicated undertaking and some delegations expressed a preference for a conceptual and analytical approach rather than elaborating a new normative framework for States.

D. Protection of the environment in relation to armed conflicts

1. General comments

43. While several delegations highlighted the relevance of the topic, some other delegations stressed its complexity and reiterated concerns regarding the scope of the topic and the lack of clarity with regard to its orientation. Some delegations questioned the legal basis of certain draft principles, although the view was also expressed that the draft principles reflected existing law. While the Commission was urged by some delegations not to attempt to modify the law of armed conflict, it was encouraged by other delegations to contribute towards the progressive development of international law in that field. Some delegations reiterated their concern about the focus on the application of bodies of law other than international humanitarian law during armed conflict; others suggested that the Commission examine to what extent principles of international human rights law and international environmental law continued to apply alongside that area of law.

2. Specific comments

44. Commenting on the scope of the draft principles, several delegations noted that the draft principles should apply to both international and non-international armed conflicts, while others preferred to limit their application to the former; yet others asked the Commission to clarify the issue. Furthermore, the view was expressed that references to cultural heritage had no place in the draft principles. The Commission was also urged to pay special attention to preventive measures. On the question of methodology, a number of delegations supported the temporal approach adopted by the Special Rapporteur, but suggested that it be applied flexibly. Several delegations asked the Commission to clarify which obligations applied in which, or all, of the phases covered by the draft principles. The Commission was also urged to adopt a human rights approach to the topic. With regard to terminology, several delegations questioned the use of the term "natural environment". Some delegations advised against the use of prescriptive language in the draft principles, while the use of a non-binding text was questioned.

45. Commenting on the draft principles provisionally adopted by the Commission, a suggestion was made to replace draft principles 1 (scope) and 2 (purpose) with a simple statement clarifying the scope. Other suggestions included adding the phrase "in accordance with international humanitarian law" to draft principle 2, and specifying that preventive measures should seek not only to minimize, but also to avoid, damage. Several delegations emphasized the central importance of draft principle 4 [I-1] (measures to enhance the protection of the environment), which addressed national measures to be taken. The use of the qualifier "effective" before "legislative ... and other measures" was, however, questioned and a suggestion was made to replace it with "relevant". The point was also made that the phrase "pursuant to their obligations under international law" could be construed restrictively as not giving rise to new obligations. With regard to draft principle 5 [1-(x)] (designation of protected zones), it was pointed out that the duty to designate protected zones, as recognized in international law, left their actual designation to the discretion of States. Concern was raised about the consistency between draft principles 5 [1-(x)] and 9 [II-1] (3) (general protection of the natural environment during armed

conflict), as the latter did not provide for special protection of protected zones during armed conflict. Similar doubts were expressed concerning draft principle 13 [II-5] (protected zones), since the term "contain" in that draft principle did not specify whether it applied to all or part of the protected zone.

46. While several delegations questioned the propriety of including a reference to indigenous peoples in draft principle 6 [IV-1] (protection of the environment of indigenous peoples), others supported this provision and some called for an expansion of its scope. Some delegations raised doubts over draft principle 7 [I-3] (agreements concerning the presence of military forces in relation to armed conflict), although the view was also expressed that its inclusion was appropriate. A number of delegations suggested that use of the term "peace operations" in draft principle 8 [I-4] (peace operations) merited further discussion; others expressed reservations over the inclusion of this draft principle. With regard to draft principle 9 [II-1] (general protection of the natural environment during armed conflict), the view was expressed that the environment as a whole could not be considered a civilian object under the rule of distinction during armed conflict. It was suggested that the three paragraphs of this draft principle could be split into individual principles. Furthermore, a suggestion was made to turn the three cumulative requirements in paragraph 2 into discrete requirements, by replacing the word "and" with "or". The Commission was also requested to explain the meaning of the term "widespread, long-term and severe damage" in draft principle 9 (2); to reconsider the wording of paragraph 3, in order to reflect the particular vulnerabilities of the environment; and to reassess the sequence of draft principles 9 and 10 [II-2] (application of the law of armed conflict to the natural environment) to avoid duplication of reference to the principle of distinction.

47. Concerning draft principle 11 [II-3] (environmental considerations), the view was expressed that the term "environmental considerations" should be further clarified. It was suggested to add a "without prejudice" clause to draft principle 12 [II-4] (prohibition of reprisals), to clarify its relationship with draft principle 9 (3). Concern was raised that the reference to "peace processes" in draft principle 14 [III-1] (peace processes) was too unspecific, and that paragraph 2 of that draft principle should not be understood as to broaden the competences of international organizations. A preference was expressed for more prescriptive language in draft principle 15 [III-2] (post-armed conflict environmental assessments and remedial measures), and for splitting the provision into two parts, one dealing with environmental assessment and another dealing with remedial measures. It was also suggested that the use of the terms "should" and "encourage" in this and other draft articles be harmonized.

48. Several delegations welcomed the inclusion of draft principles 16 [III-3] (remnants of war) and 17 [III-4] (remnants of war at sea). Others maintained that the definition of remnants of war, as provided in those draft principles, was too broad. A number of delegations urged the Commission to place emphasis on the responsibility of belligerents for remnants of war on land and at sea, particularly in the post-conflict stage. It was suggested that the draft principles should highlight the need to take removal actions without delay after the cessation of hostilities. In terms of drafting suggestions, it was proposed to amend draft principle 16 (1) to emphasize that toxic and hazardous remnants of war posed a threat to human health as well as to the environment; to retain the reference to "public health or the safety of seafarers" in draft principle 17, as originally proposed by the Special Rapporteur;

and to replace, in the same draft principle, the phrase "should cooperate to ensure" with "should cooperate in accordance with applicable rules of international law, including the United Nations Convention on the Law of the Sea, to ensure". It was further noted that the term "agreement" in draft principle 16 (2) should be interpreted broadly to ensure that it also applied to non-State actors; and that draft principle 17 should reflect that different legal regimes applied to different maritime zones. A suggestion was made to clarify the application of draft principle 18 [III-5] (sharing and granting access to information), as well as the seemingly restrictive scope of the phrase "in accordance with their obligations under international law". The introduction of a national defence exception in paragraph 2 of draft principle 18 was welcomed, but caution was expressed that the draft principle should not be read as to impose an absolute obligation to share or grant access to information in other cases.

3. Future work

49. Suggestions were made that the Commission address the human dimension of the environmental impact of conflicts; responsibility and remedies; the responsibility of non-State actors; the relationship of the topic with the principles of prevention, precaution and proportionality; the protection of water resources; and occupation in relation to the topic.

4. Final form

50. While a number of delegations expressed a preference for the elaboration of draft principles, the point was also made that the project should result in a set of draft articles.

E. Immunity of State officials from foreign criminal jurisdiction

1. General comments

51. Delegations observed that the topic involved fundamental principles of real practical significance for States, and urged the Commission to proceed cautiously and accurately. Several delegations recognized that the Commission had not yet exhausted its debate on the fifth report of the Special Rapporteur on immunity of State officials from foreign criminal jurisdiction (A/CN.4/701) and indicated that their observations were of a preliminary nature. Some delegations expressed concern that the report had been considered by the Commission despite not being available in all six official languages.

52. Some delegations stressed the need to develop the topic focusing on the *lex lata*, while other delegations emphasized the need to also progressively develop this area of the law. Some delegations suggested that the Commission should consider the *lex lata* first prior to attempting to develop the topic *lex ferenda*; and some delegations observed that a clearer distinction between what was *lex lata* and *lex ferenda* within the draft articles was warranted. Several delegations emphasized that developments in international law must be taken into account when addressing the issue of exceptions, in particular international criminal law. However, a number of delegations were of the view that the customary international law rules on immunity of State officials did not recognize any exceptions to immunity and that no clear

trend towards such a development had emerged. Some delegations observed that immunity rules were procedural in nature and should not be equated with impunity. Some delegations further underlined the need to distinguish between the exercise of inter-State jurisdiction and the exercise of jurisdiction by an international criminal jurisdiction, the latter being based on the consent of the participating State. Further analysis of the relationship between immunity *ratione personae* and *ratione materiae* was also suggested as necessary.

2. Specific comments

53. While support was expressed by some delegations for draft article 2 (f) (act performed in an official capacity), provisionally adopted by the Commission, doubt was also expressed about the necessity of such a definition. The suggestion was made to broaden the scope to comprise all functions by State officials acting in their official capacity. Some delegations encouraged further analysis of various aspects of this definition, including: the legal regime concerning *de facto* officials acting under governmental direction and control; of the relationship between immunity and acts *jure gestionis*; of acts performed in an official capacity but for personal gain; and whether acts *ultra vires* could be considered official acts for purposes of immunity. Further clarification on the relationship between immunity *ratione materiae* and the attribution of conduct to a State under the law of State responsibility was also sought.

54. Support was expressed by some delegations for draft article 6 (scope of immunity *ratione materiae*), provisionally adopted by the Commission. The usage in paragraph 3 of the term "individuals" instead of "officials" was questioned as, subsequent to the end of their term, the *troika* enjoyed immunity *ratione materiae* as State officials in accordance with draft article 5.

55. Concerning draft article 7 (crimes in respect of which immunity does not apply), as contained in the fifth report of the Special Rapporteur and currently under consideration by the Commission, several delegations supported the underlying proposition in paragraph (1) (a) that such exceptions exist under contemporary international law with regard to serious international crimes. Some delegations stressed that the question of whether exceptions to immunity should be extended also to the crimes enumerated in paragraphs (1) (b) and (1) (c) (harm inflicted on persons or property and corruption) required further analysis, with the question raised whether corruption could be considered an "act performed in an official capacity". As regarded paragraph (1) (c), it was suggested that the decisive factor for its application would be the territorial aspect and not the gravity of the crime.

56. On the other hand, several delegations stressed that the report did not substantiate paragraph (1), with additional delegations urging further analysis of State practice before reaching any conclusions on draft article 7. The importance of legal consistency with the rules pertaining to immunity before international courts was raised. Caution was also advised against any attempt to engage in expanding exceptions beyond what could be clearly shown to be supported by State practice and *opinio juris*. The use of the analogy between *jus cogens* in the work of the Commission on State responsibility and on immunity of State officials was questioned. Some delegations observed that the issue of exceptions warranted more

debate and clarification was sought as to the conceptual basis for making immunity not available for certain crimes.

57. The inclusion of corruption in paragraph (1) (b), including as compared to many other crimes covered by international conventions, was rejected by some delegations. It was proposed that the final decision on whether the crime of aggression should be included be deferred.

58. Whereas a number of delegations agreed that no exceptions to immunity *ratione personae* existed under customary international law and supported the proposition set out in paragraph (2), the viewpoint was reiterated that no rules of immunity should apply to the crimes of genocide, crimes against humanity and war crimes. It was noted that if draft article 4 (1) remained in its current form, the words "during their term of office" in paragraph 2 may be superfluous. Support was expressed for the substance of paragraph (3).

59. While an alternative analytical approach to avoid attempting to agree on a list of crimes was presented (such as a consideration of who was entitled to decide whether immunity *ratione materiae* existed in respect of a specific crime; whether the legal basis for such a decision would be custom or a treaty-based exception applicable only to States parties to the Rome Statute; and what evidential threshold was required to reach a conclusive finding that an exception existed in respect of a particular crime), a list was also considered central to the topic.

3. Future work

60. Some delegations were of the view that consideration of the procedural aspects of immunity of the topic should take into account the question of exceptions to immunity, while it was also stressed that the procedural aspects could not be analysed as completely separate from the substantive law. The need for procedural safeguards to avoid potential abuse of restrictions to immunity was raised. The importance of establishing procedural safeguards for prosecutorial independence was also underlined. Attention was drawn to the relevance of the third report of the former Special Rapporteur on procedural aspects of immunity (A/CN.4/646).

4. Final form

61. The point was made that, given that the Commission's work to date had encompassed elements that reflected existing law as well as elements that represented progressive development, the appropriate outcome of the Commission's work should be a treaty.

F. Provisional application of treaties

1. General comments

62. Some delegations considered the use of analogies with the Vienna Convention on the Law of Treaties valuable but stressed also that the consideration of the topic should be combined with an examination of practice. While the view was expressed that the topic should be examined in the light of the Vienna Convention on the Law of Treaties, the point was also made that work on the topic should not go beyond its article 25. It was further suggested that, in view of the topic's close relationship

with other treaty regimes, a holistic approach to the topic was warranted. Some delegations stressed that the Commission should study the mechanism of provisional application in different kinds of treaties, such as multilateral and bilateral treaties. While some delegations welcomed the inclusion of the practice of international organizations into the Commission's work, others questioned the appropriateness of that approach in the light of the fact that the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations was not yet in force.

63. Several delegations noted that more information on relevant State practice was needed to allow for a comprehensive consideration of the topic, as well as to further substantiate the draft guidelines and conclusions drawn. In that regard, they welcomed that the Commission had requested the Secretariat to prepare a memorandum analysing State practice in respect of treaties deposited or registered in the last 20 years with the Secretary-General. It was observed that such an analysis should focus on main trends of treaty practice, with the aim of studying broad and recurring themes and questions related to the topic.

64. Furthermore, some delegations stressed that it would be essential to find a proper balance between the provisional application of treaties and domestic law in the development of the topic, which would take into account the different national legal systems. In that regard, the comment was made that the provisional application of a treaty depends on the provisions of domestic law, including the manner of expressing consent. While the view was expressed that the Commission should conduct a comparative study of domestic provisions and practice on provisional application, some delegations urged caution and observed that whether or not a State resorted to provisional application was a constitutional and policy matter.

2. Specific comments

65. Concerning the issue of reservations, while some delegations agreed with the view of the Special Rapporteur that reservations could be made to provisionally applied treaties, others noted that more work on reservations was required, notably in the light of the Commission's Guide to Practice on Reservations to Treaties, particularly on the question of interpretative declarations, the time when a reservation was made and the question of objections.

66. Several delegations commented on the draft guidelines provisionally adopted by, or still before, the Drafting Committee, namely draft guidelines 1 to 4 and 6 to 9 and draft guidelines 5 and 10, respectively. Concerning draft guideline 2 (purpose), it was suggested that an explicit reference be made to principles of international law in order to underline that the practice of provisional application must adhere also to such principles. The Commission was also encouraged to redraft draft guideline 3 (general rule) to clarify that a State might provisionally apply a treaty pending its entry into force for that State, even if it had entered into force for other States. In relation to draft guideline 4 (form) some delegations expressed concern over the possibility of allowing provisional application by other means than those specified in article 25 of the Vienna Convention on the Law of Treaties, including by way of a decision adopted by an international conference or international organization. It was suggested that the question of form be further examined against international

practice, and the guideline reformulated in order to reflect that provisional application was conditional on the consent of the States concerned.

67. Concerning draft guideline 5, which was kept in abeyance by the Drafting Committee, it was suggested that the draft guideline focus on the relationship between unilateral declarations and the provisional application of treaties in the context of internal law. However, the comment was also made that the question of unilateral declarations needed to be addressed with caution.

68. With regard to the issue of commencement of provisional application, it was suggested that draft guideline 6 be further deliberated to take into consideration the rights and obligations of States that arose from provisionally applied treaties. In relation to draft guideline 7 (legal effects of provisional application), while several delegations reiterated that they considered provisionally applied treaties to largely produce the same legal effects as treaties formally in force, it was also observed that this may not necessarily imply that all articles of the Vienna Convention on the Law of Treaties relating to treaties in force apply in the same manner to provisionally applied treaties. It was therefore suggested that this issue be studied further, on the basis of a detailed review of State practice. At the same time, the view was expressed that this provision was contentious from a theoretical perspective and that more nuanced language might be required. The comment was also made that provisional application could not replace entry into force, since domestic legal requirements must be met before a treaty could enter into force. An observation was further made to the effect that a provisionally applied treaty was only morally and politically binding and that its legal effects should not go further than article 18 of the Vienna Convention on the Law of Treaties. Some delegations suggested that the issue of international responsibility addressed in draft guideline 8 (responsibility for breach) had to be studied further, in particular the extent of the legal consequences arising from a breach of a provisionally applied treaty. Regarding draft guideline 9 (termination upon notification of intention not to become a party), the Commission was invited by some delegations to further analyse the question of termination, also in the light of article 60 of the Vienna Convention on the Law of Treaties, as well as in relation to States for which the treaty had already entered into force. Whereas some delegations considered that article 60 applied *mutatis mutandis* in the context of provisional application, the view was also expressed that article 25 constituted a self-contained regime with regard to termination. It was further observed that termination must be clearly expressed in order to prevent any doubt.

69. While some delegations welcomed the Special Rapporteur's proposal for draft guideline 10 (internal law and the observation of provisional application of all or part of a treaty), they also encouraged a broadening of the provision to take into account the permissible cases of States limiting provisional application by reference to their internal law or addressing this issue in a separate guideline. It was observed that the relationship between provisional application and internal law would benefit from further clarifications in the light of the debate within the Commission. Such further analysis should also address the question of valid consent. In addition, the Commission was invited to align the language of draft guideline 10 with that of the other draft guidelines, as well as with article 27 of the Vienna Convention on the Law of Treaties.

3. Future work

70. Some delegations supported the inclusion of a general draft guideline that would provide that the Vienna Convention on the Law of Treaties applied *mutatis mutandis* to provisionally applied treaties. While some delegations welcomed the Special Rapporteur's intention to analyse the provisional application of treaties that enshrine the rights of individuals, others questioned the usefulness of such an analysis. Moreover, the Commission was encouraged to address other issues, including whether treaty content had an impact on the mechanism of provisional application, and whether provisional application was possible *inter se* or for just one State. It was also suggested that it be explored whether conclusions could be drawn from the relevant provisions in the 1978 Vienna Convention on Succession of States in respect of Treaties to facilitate a broader understanding of provisional application as a concept of international law in a wider sense.

4. Final form

71. Some delegations welcomed the preparation of guidelines and stressed that they should be of practical value. It was pointed out that such guidelines should be confined to addressing the most common issues surrounding the topic, which would provide guidance on the principal questions, and be based on State practice. While several delegations observed that the preparation of model clauses could be useful, some other delegations did not support that approach, or found it premature.

G. Other decisions and conclusions of the Commission

1. Future work of the Commission

72. Concerning the long-term programme of work of the Commission, delegations took note of the inclusion of the topics "The settlement of international disputes to which international organizations are parties" and "Succession of States in respect of State responsibility". Some delegations suggested that the Commission focus on finalizing current topics prior to taking up new topics.

73. Several delegations welcomed the inclusion of the topic "The settlement of international disputes to which international organizations are parties", noting the frequency of such disputes. A number of delegations stressed that work on this topic should not be limited to disputes governed by international law and should also address those of a private law character. At the same time, the difficulty of finding common norms in this field in the light of the diversity of international organizations was noted.

74. Whereas some delegations supported the inclusion of the topic "Succession of States in respect of State responsibility", some other delegations questioned its contemporary relevance. Attention was drawn to the complex aspects of the topic, upon which it would be difficult to reach common understandings.

75. The Commission was further encouraged to address the topics "The fair and equitable treatment standard in international investment law" and "Protection of personal data in trans-border flow of information", which are already on its long-term programme of work, and to consider a new topic on "Duty of non-recognition

as lawful a situation created by a serious breach by a State of an obligation arising under a peremptory norm of general international law". Several delegations noted the recommendation by the Commission that the potential topics identified in the memorandum by the Secretariat be further considered by the Working Group on the long-term programme of work in 2017.

2. Programme and working methods of the Commission

76. A number of delegations appreciated or took note of the Commission's recommendation to hold an event to celebrate its seventieth anniversary in 2018. Several delegations supported the Commission's recommendation to hold the first part of its seventieth session (2018) in New York. However, other delegations questioned the need to hold future sessions of the Commission in New York. Some delegations emphasized the importance of interactions between the Commission and the Sixth Committee. In that regard, the initiative to hold informal discussions between the members of the Sixth Committee and the members of the Commission throughout the year was welcomed.

77. Concerning the working methods of the Commission, support was expressed for the Commission's approach to hold meetings with specialists in various fields when tackling complex technical, scientific or specialized topics.

78. Several delegations welcomed the holding of the International Law Seminar and invited States to make contributions to the related Trust Fund to allow for participation in the Seminar. The updates to the *Yearbook of the International Law Commission* and the website of the Commission were noted with satisfaction. Support was expressed for the continuation of the legal publications prepared by the Codification Division. Some delegations welcomed the Commission's commitment to multilingualism and insisted that the six official languages be accorded equal treatment. Delegations also expressed appreciation for the new system that had been put in place for the editing of the Commission's documents. It was hoped that such a system would enable the issuance of the report in all official languages simultaneously.

III. Topics on which the Commission completed work at its sixty-eighth session

A. Identification of customary international law (on first reading)

1. General comments

79. Delegations generally welcomed the draft conclusions, the commentaries and the bibliography annexed thereto as important texts that would greatly facilitate the work of practitioners, academics and judges. Some delegations also expressed appreciation to the Secretariat for its memorandum on the role of decisions of national courts in the case law of international courts and tribunals of a universal character for the purpose of the determination of customary international law (A/CN.4/691).

80. A number of delegations, in welcoming the Commission's methodological choice to provide guidance in the identification of customary international law,

underlined the importance of a cautious approach that would focus solely on the codification of established rules concerning the identification of customary international law. In that regard, it was proposed to highlight in the final outcome text of that topic that customary international law was subject to rigorous requirements and that it was not easily created or inferred.

2. Specific comments

81. A number of delegations expressed support for draft conclusion 1 (scope). Some delegations considered that the draft conclusions and commentaries could be made even more useful by expanding the breadth of issues analysed. In addition, the view was expressed that it was important to avoid selectively applying supposed rules of customary international law to circumvent clear treaty obligations. In that regard, an additional draft conclusion was envisaged, affirming that the conduct of a State that was contrary to a treaty should be presumed not to contribute to the formation of a new rule of customary international law.

82. With regard to draft conclusion 2 (two constituent elements), delegations generally reiterated their agreement with the two-element approach adopted by the Commission. In relation to draft conclusion 3 (assessment of evidence for the two constituent elements), several delegations highlighted the importance of a separate assessment concerning the evidence of each of the two constituent elements. The view was also expressed that such evidence must arise from as many countries as possible in order to reflect diverse legal traditions. In that regard, a number of delegations underlined the importance of the accessibility of evidence of customary international law.

83. Concerning draft conclusion 4 (requirement of practice), a number of delegations supported the current formulation and commended the primary emphasis on the practice of States. However, it was noted that further comments from States were necessary in the light of the divergence of views concerning the role of international organizations in the formation or expression of rules of customary international law in paragraph 2. A number of delegations underlined that taking into account the practice of international organizations was important, especially in those cases where powers were devolved by States to complex international organizations such as the European Union. According to some delegations, the text of paragraph 2 was an exercise in progressive development, since the practice of international organizations could not be expressive of customary international law and could never be equated with the practice of States. It was remarked that such practice could only be relevant to rules of customary international law pertaining to international organizations. According to some delegations, the practice of international organizations could only be deemed relevant if it were in fact either the practice of States composing the organization or conduct carried out on behalf of States. Concerning the conduct of other actors mentioned in paragraph 3, the view was expressed that confusion may arise from the statement that such conduct may be relevant, since it did not meet the requirement of practice under international law.

84. Support was expressed by some delegations for the current formulation of draft conclusion 5 (conduct of the State as State practice). It was underlined that the practice in question must be publicly available or at least known to other States, so

that any objections to the emergence of a new rule of customary international law may be timely formulated by other States. Furthermore, the view was advanced that the lack of hierarchy among different branches of government that was implied in the current formulation of draft conclusion 5 may be misleading, in that hierarchically superior organs and those involved in international affairs should be given more weight.

85. Some delegations expressed support for the formulation of draft conclusion 6 (forms of State practice). Several delegations noted that inaction of States cannot be treated as State practice, nor as implied acceptance as law (*opinio juris*), unless such inaction is deliberate and the State is objectively able to react.

86. Draft conclusion 7 (assessing a State's practice) was also met with support from some delegations. Support was also expressed in relation to the requirement of generality of practice enshrined in draft conclusion 8 (the practice must be general), and the importance of practice from specifically affected countries was underlined.

87. In relation to draft conclusion 9 (requirement of acceptance as law (*opinio juris*)), support was expressed by a number of delegations. In particular, the importance of differentiating acceptance as law from the other, extralegal motives was highlighted.

88. Concerning draft conclusion 10 (forms of evidence of acceptance as law (*opinio juris*)), it was underlined that a distinction must be made between purely internal practice of exclusively domestic relevance and practice meant to have an external orientation. In relation to paragraph 2, the view was put forward that conduct of a State in relation to the adoption of a resolution of an international organization might reflect political considerations and thus should not be deemed expressive of a legal opinion. In relation to paragraph 3, concerning the failure to react over time to the practice of other States, several delegations expressed the view that a lack of reaction to a certain practice should not necessarily be assimilated to agreement thereto, especially in situations where it would not be expedient or possible to react.

89. Several delegations voiced support for the formulation of draft conclusion 11 (treaties) on the significance of treaties for the identification of customary international law. The view was expressed that explicit reference should be made to the "potentially norm-creating" character of the rule of a treaty before it could be creative of customary international law.

90. Support was voiced by several delegations for draft conclusion 12 (resolutions of international organizations and intergovernmental conferences) on the significance of such resolutions for the identification of customary international law. It was affirmed that resolutions could only be relevant as the acceptance as law (*opinio juris*) of States, not as practice thereof. The view was expressed that the text of draft conclusion 12 should have been similar to that of draft conclusion 11, because both treaties and resolutions "may" reflect rules of customary international law, depending on the circumstances. It was proposed that the special role of the codification work of the Commission, as the object of discussion among States in the General Assembly, should be reflected in a discrete paragraph of this provision.

91. The formulation of draft conclusion 13 (decisions of courts and tribunals), on the significance of such decisions for the identification of customary international

law, met the support of some delegations. It was underlined that, in principle, decisions of courts and tribunals were binding only on their parties, and that it was the reaction thereto from other States that revealed their authority as statements of customary international law. The question of the relative value of decisions by international and domestic courts was addressed by several delegations. While, in the view of some delegations, the persuasive force of a decision was the only relevant criterion, so that a domestic decision where international law was given weight in the reasoning could be as relevant as an international decision, for others the domestic decisions of courts and tribunal could only count as the domestic judicial practice of the State.

92. Some support was also expressed with relation to draft conclusion 14 (teachings) on the subsidiary role of teachings of publicists for the identification of customary international law. The view was advanced that such a role was nowadays a limited one, in the light of the great proliferation of primary sources in international law, chiefly treaties.

93. The text of draft conclusion 15 (persistent objector) was met with some support. Some delegations highlighted the importance of safeguarding the role of peremptory norms of international law (*jus cogens*). Other delegations highlighted the importance of the time in which the objection is formulated, so that a breach of an already existing obligation may not be confused with a persistent objection thereto. The view was also expressed that, in the light of the lack of jurisprudence on the matter, it was premature to develop a draft conclusion on the issue. In addition, the view was affirmed that the persistent objector rule related to the effects and application of customary rules and was therefore not necessary in the draft conclusions. Draft conclusion 16 (particular customary international law) also met with support. The view was expressed that any particular customary international law derogating from general custom would have to be the object of a strict standard of proof.

3. Future work

94. Several delegations welcomed the request that the Secretariat produce a memorandum on the ways and means to make the evidence of customary international law more readily available.

B. Subsequent agreements and subsequent practice in relation to the interpretation of treaties (on first reading)

1. General comments

95. Delegations generally welcomed the adoption, on first reading, of the draft conclusions on the topic, together with their commentaries, and emphasized their practical utility. Some delegations stressed that subsequent agreements and subsequent practice could only play a supplementary role in the interpretation of treaties, confined by the framework of articles 31 and 32 of the Vienna Convention on the Law of Treaties. While some delegations stated that the draft conclusions only applied to the interpretation of treaties between States, others noted that the draft conclusions could also be relevant to the interpretation of treaties involving

international organizations, particularly where articles 31 and 32 of the Vienna Convention on the Law of Treaties applied as a matter of customary international law.

2. Specific comments

96. A suggestion was made to reword draft conclusion 1 [1a] (introduction) to indicate that the draft conclusions did not address all conceivable circumstances in which subsequent agreements and subsequent practice might play a role in the interpretation of treaties. With regard to draft conclusion 2 [1] (general rule and means of treaty interpretation), the view was expressed that the "nature" of a treaty should not be included as an element influencing the value to be given to a certain means of interpretation. In relation to draft conclusion 5 (attribution of subsequent practice), a distinction was drawn between conduct that could be attributed to States under the law of State responsibility and conduct attributable to them for the purposes of the interpretation of treaties. While the view was expressed that conduct of non-State actors should never be taken into account in the interpretation of treaties, the Commission's balanced approach towards that issue was welcomed.

97. The Commission was encouraged to distinguish, in the context of draft conclusion 6 (identification of subsequent agreements and subsequent practice), between positions of States taken with regard to the interpretation of a treaty, and conduct of States in relation to a treaty based on other considerations. A number of delegations welcomed the presumption, in draft conclusion 7 (possible effects of subsequent agreements and subsequent practice in interpretation), that subsequent practice of the parties to a treaty would not generally amend or modify the treaty. While some delegations emphasized that such practice could never modify or amend a treaty, support was expressed for a more flexible approach that would allow treaties to adapt to societal and technological changes.

98. With regard to draft conclusion 8 [3] (interpretation of treaty terms as capable of evolving over time), the cautious approach of the Commission towards determining whether to adopt an evolutive approach in the interpretation of a particular treaty term was welcomed. The view was expressed that draft conclusion 9 [8] (weight of subsequent agreements and subsequent practice as a means of interpretation) should elaborate further criteria for determining the weight of subsequent agreement or subsequent practice, including the timing of a practice or the importance attached to the practice by the parties. With regard to draft conclusion 11 [10] (decisions adopted within the framework of a Conference of States Parties), it was pointed out that such decisions could constitute subsequent practice only in exceptional circumstances, for example when adopted by consensus or with unanimity.

99. In connection with draft conclusion 12 [11] (constituent instruments of international organizations), it was suggested that the Commission should consider the practice of international organizations not only in relation to their constituent instruments, but to international law in general. With regard to paragraph 3 of the draft conclusion, it was stated that the practice of an international organization in the application of its constituent instrument could not be considered relevant to treaty interpretation under article 31 (1) of the Vienna Convention on the Law of

Treaties, and the Commission was requested to further specify the relevance of article 32 in that regard.

100. Several delegations welcomed draft conclusion 13 [12] (pronouncements of expert treaty bodies). A suggestion was made to replace the term "experts serving in their personal capacity" with "independent experts". The Commission was also urged to reconsider the definitions of "expert treaty body" and "organ of an international organization" to ensure that the draft conclusions would apply to regional organizations not falling within those categories. A number of delegations agreed that the weight of pronouncements of expert treaty bodies was subject to the relevant treaty itself, although it was pointed out that the practice of parties in relation to a pronouncement could also be taken into account.

101. Several delegations emphasized that pronouncements of expert treaty bodies could not, in and of themselves, constitute subsequent practice establishing the agreement of the parties as to the interpretation of the treaty. It was suggested that they rather constituted a "subsidiary means" of interpretation. Some delegations suggested including a proviso to that effect in paragraph 3. The view was expressed that resolutions citing pronouncements of expert treaty bodies, including those adopted by consensus, could not be construed as constituting the agreement of States with the pronouncements themselves. It was suggested that the Commission should further study the ways of identifying agreement of the parties regarding the interpretation of a treaty as expressed in the pronouncement of an expert body. The Commission was also requested to consider to what extent it constituted an expert treaty body within the scope of the draft conclusions.

102. Several delegations agreed that silence by a party did not constitute acceptance of a pronouncement of an expert treaty body, pursuant to paragraph 3. Lastly, it was suggested that the Commission should give further consideration to the "without prejudice" clause in paragraph 4 of the draft conclusion.

3. Future work

103. It was suggested that, on second reading, the Commission should include a provision on the role of decisions of national courts as subsequent practice relevant to the interpretation of treaties.

C. Protection of persons in the event of disasters (on second reading)

1. General comments

104. Delegations congratulated the Commission on its adoption, on second reading, of the draft articles on the protection of persons in the event of disasters. Delegations were generally of the view that the draft articles constituted a comprehensive framework for response to, and the reduction of risks associated with, disasters and protection of persons. The point was made that adjustments had been made to the draft articles during the second reading, drawing on the comments submitted by States and international organizations. The view was also expressed that the draft articles struck an appropriate balance between the rights and obligations of both the affected State and assisting States. Nonetheless, some

delegations indicated that not all concerns had been addressed. It was also noted, in particular, that the draft articles largely reflected *lex ferenda*.

105. Delegations underscored the principle of the sovereignty of States and thus the primacy of the responsibility of the affected State to evaluate the scale of international assistance required when a disaster manifestly exceeded its national response capacity. Support was expressed by some delegations for the strong emphasis placed in the draft articles on the principles of respect for human dignity and protection of human rights. The observation was made that the draft articles applied with flexibility to both natural and human-made disasters outside the realm of international humanitarian law and that they did not discriminate on the basis of nationality or legal status, since they focused on both the needs and rights of the victims. Reference was also made to the continuing need to mainstream a gender perspective into humanitarian assistance to ensure that it was effective, impartial and reached all segments of the population, and to address the heightened risk of sexual and gender-based violence associated with disasters and other emergencies.

106. A preference was also expressed for taking a more pragmatic approach, with a clear framework of rules designed to facilitate international cooperation in practical terms, rather than a strictly rights-based approach. It was observed that a more operational text could have a more direct impact on the most common regulatory problem areas in international response. According to that view, although important improvements had been made in the final draft, the text remained overly cautious with regard to the issue of protection, but not quite cautious enough regarding its applicability to mixed situations of conflict and disaster.

2. Specific comments

107. It was considered appropriate that the preamble reaffirmed the primary role of the affected State in taking action in the event of a disaster. It was suggested that a reference be added to the last paragraph of the preamble whereby all States would be invited to assist the United Nations and its agencies when providing relief to persons in the event of disasters, since any call for immediate action at such times usually went directly to them.

108. The view was expressed that, in order to bring draft article 2 (purpose) into line with the general thrust of the text, greater emphasis should be placed on the rights and not the needs of affected persons. It was suggested that the commentary to certain draft articles could be elaborated further, for example concerning the concept of serious disruption of the functioning of society, in draft article 3 (use of terms). A preference was expressed for merging draft articles 4 (human dignity) and 5 (human rights), and indicating in the texts of, and the commentaries to, both draft articles that their contents were without prejudice to the positive and negative obligations of States at the international level.

109. Several delegations supported the rights-based approach embodied in draft articles 5 to 7 (human rights, humanitarian principles and duty to cooperate). It was noted that the challenges posed by disasters resulted in an increased risk of human rights violations, making it essential to recognize human dignity and human rights as absolute principles that must be upheld during a humanitarian response. It was also observed that it was appropriate that the draft articles emphasized the needs of the most vulnerable, since disasters disproportionately disrupted the lives of

children, the elderly and persons with disabilities. Some delegations reiterated their view that a distinction had to be drawn, in draft article 7, between cooperation of States among themselves, in application of a fundamental principle of international law, and the duty to cooperate with international organizations, non-governmental organizations and "other assisting actors".

110. Delegations welcomed draft article 9 (reduction of the risk of disasters), and it was observed that the Commission's work on risk prevention reflected the significant advances that had been made in the practice of disaster law, in the areas of risk reduction, early-warning mechanisms, enhanced cooperation and information-sharing. In terms of another view, the provision constituted progressive development of international law, and concerned an obligation of conduct rather than of result.

111. As regarded draft article 10 (role of affected State), doubts were expressed concerning the reference to the affected State's "primary" role, and it was queried whether it implied that responsibility for the direction, control, coordination and supervision of relief assistance might be shared with actors playing a secondary role. In terms of another view, draft articles 10, 11 (duty of the affected State to seek external assistance) and 13 (consent of the affected State to external assistance) were essential, because they recognized, as historical experience had shown time and again, that a disaster could manifestly exceed the affected State's capacity to respond, and that establishing a qualified consent regime for the affected State, to be exercised in good faith, balanced the right of State sovereignty with the sovereign State's obligation to protect human life and human rights during disasters in a timely manner.

112. Concerning draft article 11, it was noted that it remained unclear whether the word "manifestly" meant "obviously" or "substantially". Another view welcomed the emphasis in draft article 11 on the affected State's responsibility for determining the extent of its national response capacity to cope with a disaster. The view was also expressed that the principle of good faith should be the crucial factor in determining whether the threshold requirements of the draft article applied.

113. Support was expressed for the careful balance achieved in draft article 13, and in particular paragraph 2, which provided that the consent of affected States to the provision of external assistance must not be withheld arbitrarily. It was noted that, in the context of armed conflict, such a refusal could amount to a breach of international humanitarian law. In terms of another view, it was not clear how arbitrariness could be ascertained. The concern was expressed that such a determination risked being influenced by political factors that might entail legal consequences for the affected States. Other delegations were of the view that the guidance provided in the commentary to the draft article was particularly helpful in that regard.

114. On draft article 15 (facilitation of external assistance), the view was expressed that practice showed that more issues had to be addressed by national laws than those cited, such as confidentiality, liability, reimbursement of costs, control and competent authorities. Support was also expressed for draft article 16 (protection of relief personnel, equipment and goods), which recognized the affected State's duty to guarantee the protection of relief personnel, equipment and goods and not to cause them harm. The view was expressed that the explicit reference in draft article

17 (termination of external assistance) to the possibility of termination of external assistance at any time was inappropriate, since it might lead to an abrupt termination of assistance before a new assisting actor could fill the gap.

115. Several delegations expressed support for the new wording of draft article 18 (relationship to other rules of international law), in particular regarding the rules of international humanitarian law. However, the view was expressed that paragraph 2 raised the question of whether the draft articles gave way only to those rules that specifically addressed disaster relief or to all rules of international humanitarian law. It was also noted that, even under international humanitarian law, the consent of the affected State was generally required in circumstances where a third State wished to provide assistance. The concern was also expressed that the draft articles presented a risk of conflict with norms of international humanitarian law and might ultimately undermine the ability of impartial humanitarian organizations to provide assistance.

3. Final form

116. A number of delegations expressed support for the recommendation of the Commission that a convention be negotiated on the basis of the draft articles. It was observed that there was a need for codification because the growing number of bilateral, regional and multilateral instruments on disaster prevention, management and response had created a spontaneous legal framework lacking in harmonization in terms of terminology, definitions, principles and the nature and scope of obligations. It was also noted that such a convention would also fulfil the perceived need for the systematization of international law regulating humanitarian relief to which the Secretariat had drawn attention when it had first proposed the topic. It was also observed that, if adopted in the form of a framework convention, the draft articles could have a positive impact in accelerating the development of more detailed national laws and procedures about international disaster cooperation.

117. Other delegations expressed doubts about the need to develop a convention. The concern was expressed that a binding convention would result in a range of administrative procedures that could complicate the deployment of aid, and hence prove counterproductive. Doubt was also expressed as to whether a convention would be of such interest that it would garner sufficient support from States. It was suggested instead that it might be worth considering how the Commission's work affected the subsequent practice of States, before taking a decision to proceed to a convention. It was also suggested that the topic be addressed through the provision of practical guidance (in the form of guidelines) for affected and assisting States. It was also suggested that the drafts articles could be adopted by means of the General Assembly in a resolution in order to preserve their integrity.